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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 428

MORRIS NARCISSE, JR.,

Petitioner,

versus

THE AMERICAN SUGAR REFINING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

BENJAMIN E. SMITH,
406 Civic Center Building,
New Orleans 12, Louisiana,
Attorney for Petitioner.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

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MORRIS NARCISSE, JR.,

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THE AMERICAN SUGAR REFINING COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

Petitioner prays that a writ or writs of certiorari issue to review the judgment of the Supreme Court of Louisiana made and entered in the above-entitled cause on May 30, 1961.

OPINION BELOW.

In a *per curiam* announced on May 30, 1961, the Supreme Court of Louisiana affirmed the decision of the Court of Appeals, Fourth Circuit, State of Louisiana, rendered on April 3, 1961, reported 128 So. (2d) 689,

which sustained an exception jurisdiction *rationae materiae* upheld by the Trial Court.

JURISDICTION.

The judgment of the Supreme Court of Louisiana is a final one in which it was held that the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., 901, *et seq.*, controlled instead of Louisiana Workmen's Compensation Statute, Title 23:1021, *et seq.* That the jurisdiction of this Court is invoked under Title 28 of the United States Code § 1257(3), providing for the granting of a writ of certiorari, when the State Workmen's Compensation statute as interpreted is repugnant to the Constitution, treaties or laws of the United States, and under Title 28 U. S. C. A. § 1257(1) when the Louisiana State Supreme Court decided against the election provisions available claimants under 33 U. S. C. A. 901, *et seq.* as sought herein.

QUESTIONS PRESENTED.

The petitioner, while employed as a storer, a land job classification, by The American Sugar Refining Company, was severely injured when he fell into a barge which was tied up at the American Sugar Refinery's dock on the Mississippi River.

Would the classification of the petitioner as a "twilight zone" worker and or engaged in maritime work of a local character at the time of his alleged injury destroy the uniformity of the Longshoremen's and Harbor Workers' Act and be an affront on the law? Petitioner at the time he was allegedly injured was not working for a

maritime employer, and said employer is not engaged in the business of maritime contracts.

Therefore, the question presented for consideration may be said to be: (1) Is the plaintiff-appellant a "twilight zone" worker and or engaged in maritime work local in character at the time of the alleged injury and thus eligible for State Workmen's Compensation benefits should he so elect?

STATEMENT.

This suit arises out of an industrial accident on a barge tied up at the dock of the American Sugar Refining Company on the Mississippi River, at Chalmette, Louisiana, which barge Morris Narcisse, Jr., the petitioner, was helping to close up because it had started to rain. Just prior to the alleged accident, petitioner had been working in the barge, operating a piece of machinery called a pull-pac. Narcisse received premium pay when he worked on the barges.

While it is admitted that Narcisse was working on a barge when injured, it must also be stated that when there was no barge to work or rain prevented a barge from being worked, Narcisse worked on the land within the refinery itself, operating less complicated equipment than aboard the barge. His employer, the defendant, is a land employer whose business is the refining and packaging of sugar.

Petitioner was paid Longshoremen's and Harbor Workers' benefits from May 12, 1958, until August 11, 1958, after which he was given an unsolicited award of

$200.00 for facial disfigurement by the United States Deputy Commissioner administering the Longshoremen's and Harbor Workers' Statute.

Since August 11, 1958, petitioner has been employed as a storer at defendant's refinery in the warehouse and has since worked on a barge for only a three-week period.

ARGUMENT.

I.

Petitioner, working for a non-maritime employer at the time of the alleged injury, was a "twilight zone" worker employed in discharging duties that were maritime but local in character.

This Court is again called upon to set the illusionary demarkation point of the "twilight zone," a line which in some cases has alarmed some practitioners and left them with a feeling of not knowing which way to turn. In Louisiana, it was felt that after the *Ellis v. Travelers* [1] case, the Supreme Court of Louisiana, in reversing the *Richards* case,[2] had finally set up a standard which the Trial Courts and lower Appellate Courts would apply in future cases such as the case at bar.

In *Ellis* the Court rightly held that a longshoreman is confined to longshoremen's remedies. The Court then went on to establish a set of rules by which the practitioner could with some degree of certainty determine whether his client should pursue his remedy in the State

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[1] **Ellis v. Travelers Insurance Co.**, 123 So. (2d) 780-785.

[2] **Richard v. Lake Charles Stevedores**, 95 So. (2d) 830 (1957).

Courts or under the Federal Compensation Act.[3] This test, which is mentioned above, consists of the following four points:

> "1. He must be injured aboard a vessel docked on navigable waters and engaged in interstate commerce.
>
> 2. He must be injured while performing duties of a longshoreman.
>
> 3. He must have been performing duties which were wholly maritime in nature, which were:
>
> 4. For the benefit of an employer engaged in fulfilling maritime contracts." (See *Ellis v. Travelers, supra.)*

These same four points were applied to hold that *Ellis* could only seek his remedy under the Federal Compensation Act, not giving to him the election allowed a longshoreman employed by a maritime employer whose principal business is the fulfillment of maritime contracts. Narcisse, the petitioner here, was working at the time of the alleged injury on a barge moored at the defendant's dock on the Mississippi River; he was not working for a maritime employer nor was the employer primarily engaged in the discharge of maritime contracts.

Additionally, petitioner's employment with the defendant was of such a nature that it was divided almost equally between duties performed on land in defendant's warehouse and upon barges tied up to the wharf adjacent to the warehouse in which petitioner worked.

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[3] **Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901, et seq.**

Much of what will be said in this case has already been said in *Ellis v. Travelers Insurance Co., et al.* (1960), 123 So. (2d) 780. The opinion therein precludes any lengthy attempt on the part of the applicant to summarize the history and course of the relationship between Federal and State Compensation Acts in the field of maritime employment.

It is submitted by applicant that the facts of this case are four-square in conformity with the facts of the *Davis* case.[4] In *Davis*, state compensation was awarded a structural iron worker killed while working on a barge. It may be said that part of the rational of *Davis* was based upon the fact that he was not a longshoreman, and, secondly, that he was not employed by a typical maritime employer since his job at the time of his death was to dismantle a bridge crossing navigable waters. If these are tests, then Appellant in the instant case is not a longshoreman but is quite clearly a twilight zone worker. This Court itself has alluded to these standards in the *Ellis* decision[5] when it said as to Ellis:

> ". . . he was injured aboard a vessel docked on navigable waters and engaged in interstate commerce while performing the duties of longshoreman which were wholly maritime in nature and for the benefit of an employer engaged in fulfilling maritime contracts."

If these are the tests for longshoreman status, then Narcisse does not meet them.

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[4] **Davis v. Dept. of Labor and Ind. of Washington**, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

[5] **Ellis v. Travelers Insurance Co., et al.**, (1960) 123 So. (2d) 780 at 786.

(1) He was the employee of a domestic and foreign sugar refiner who is primarily, if not exclusively, employed in the refining and sale of sugar, and it is only by the incidental arrival of this product by barge that it employs workers in a maritime context.

(2) Applicant was not engaged in work wholly maritime in nature. His skill was not that of a longshoreman. The transcript of testimony shows that during periods of wet weather he was required to cease barge operations and to work in the warehouse of the refinery, assigned to the labor pool.

Applicant Narcisse was skilled at operating both lift-trucks and pul-pac machines, and when not using the pul-pac machine on the wharf, would use the lift-truck in the refinery.[6]

It must also be said that the twilight zone as created by the *Davis* case[7] and its continued recognition throughout the years, including the recognition contained in the decision of this Court in the *Ellis* case,[8] fully justi-

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[6] See record, p. 45 (Tr. p. 16):

"Q. Now, as a pul-pac or lift operator, did you always work in barges prior to your accident?

A. Yes, sir, I did, excepting whenever it was raining or the weather was bad, then naturally I would drive the fork lift in the warehouse.

Q. In other words, prior to your accident, you worked both in barges and in the warehouse?

A. Yes, sir.

Q. Where did you work when there were no barges in?

A. Well, we would work in the warehouse or out of the labor pool, or something."

[7] **Davis v. Dept. of Labor and Ind. of Washington**, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

[8] **Ellis v. Travelers Insurance Co., et al.**, 123 So. (2d) 780 (1960).

fies a finding that Narcisse is a twilight zone employee. This point is given added emphasis when one considers the most recent important decision in this field under *Hahn v. Ross Island Sand and Gravel Co., Inc.*[9] In that case, an oiler employed on a dredge was granted the right to sue in negligence in the Oregon Courts, the United States Supreme Court, in applying the twilight zone theory held that the Longshoremen and Harbor Workers' Compensation Act was not Hahn's exclusive remedy.

Finally, under the holdings in the cases of *Western Falls Co. v. Garcia* (1921), 257 U. S. 233, 66 L. Ed. 210, 42 S. Ct. 89; *Grant Smith-Porter Ship Co. v. Rohde* (1922), 257 U. S. 469, 66 L. Ed. 321, 42 S. Ct. 157, and *Sultan Railway and Timber Co. v. Dept. of Labor and Industry of State of Washington* (1928), 277 U. S. 135, 72 L. Ed. 820, 48 S. Ct. 505, Narcisse was employed in an occupation which was maritime but local, particularly since the main business of his employer was the refining and marketing of sugar.

REASONS FOR GRANTING THE WRIT.

The decision of the Louisiana Supreme Court in the *Ellis* case was incorrectly applied to the case at bar. The effect of such incorrect application is to seriously impair the election provisions of the Federal Statute as described by this Court in the "twilight zone" cases. If maritime workers are to again be technically limited in their choice of actions for injury then it should be done by this Court. The substantive holdings of the twilight zone cases as well as the need for uniformity in the Maritime Law justify the granting of this writ.

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[9] 358 U. S. 272, 79 S. Ct. 266 (1959), noted 34 TLR 233 (1959).

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

BENJAMIN E. SMITH,
406 Civic Center Building,
New Orleans 12, Louisiana,
Attorney for Petitioner.

APPENDIX.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

NO. 369-506 DIVISION "A" DOCKET 4

MORRIS NARCISSE, JR.

vs.

THE AMERICAN SUGAR REFINING COMPANY

J U D G M E N T

This cause was tried and submitted to the Court for adjudication.

PRESENT:

Benjamin E. Smith and Rudolph R. Schoemann, Attorneys for plaintiff.

Leon Sarpy, attorney for defendant.

The Court considering the law, the evidence, and argument of counsel, and being of the opinion that there should be judgment in favor of defendant, for the reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, American Sugar Refining Company, and against the plaintiff, Morris Narcisse, Jr., dismissing the suit of said plaintiff at his costs.

JUDGMENT READ AND RENDERED in open court this 6th day of July, 1960, at New Orleans, Louisiana.

JUDGMENT READ AND SIGNED in open court this 12th day of July, 1960, at New Orleans, Louisiana.

s/ Paul E. Chasez

J U D G E

MORRIS NARCISSE, JR. : # 57
v. : COURT OF APPEAL
THE AMERICAN SUGAR : FOURTH CIRCUIT
REFINING COMPANY : STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "A"; No. 369-506, HONORABLE PAUL E. CHASEZ, JUDGE

GEORGE JANVIER
JUDGE

COURT COMPOSED OF JUDGES GEORGE JANVIER, RICHARD T. McBRIDE AND L. JULIAN SAMUEL

BENJAMIN E. SMITH, attorney for Plaintiff-Appellant

CHAFFE, McCALL, PHILLIPS, BURKE & HOPKINS; LEON SARPY AND ROBERT B. DEANE, JR., attorneys for Defendant-Appellee

AFFIRMED

The plaintiff, Morris Narcisse, Jr., having been accidentally injured while engaged in hazardous employment by defendant, the American Sugar Refining Company, brought this suit in the Civil District Court for the Parish of Orleans under the Louisiana Workmen's Com-

pensation Laws, LSA-R. S. 23:1021, et seq., praying for judgment based on total disability.

The defendant, after an unsuccessful attempt to remove the case to the United States District Court for the Eastern District of Louisiana, excepted to the jurisdiction of the State courts of Louisiana, ratione materiae, on the ground that "the alleged facts in this proceeding should be brought exclusively under the provisions of the United States Longshoremen & Harbor Workers Compensation Act, and that all matters under the said Act are cognizable only by the United States Deputy Commissioner and the United States Courts." This exception was overruled and the defendant, reserving its rights under the exception, answered denying that plaintiff had been totally and permanently injured and averring that plaintiff had accepted certain payments under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act (33 USCA 901 et seq.), and that accordingly "* * * all remedies available to the plaintiff should be pursued under the said United States Longshoremen's and Harbor Workers' Compensation Act." By supplemental answer the defendant averred that plaintiff had been injured on March 12, 1958, and had returned to work on August 11, 1958, and that during the period in which he did not work he had been paid compensation from the United States Longshoremen's and Harbor Workers' Compensation Act in an amount in excess of what he would have received under the Louisiana Workmen's Compensation Laws, and that he had also negotiated for and had received an amount of $200.00 for facial disfigurement.

After a trial on the merits defendant renewed its exception to the jurisdiction which was again overruled, and there was then judgment dismissing plaintiff's suit. Plaintiff has appealed.

Since the exception to the jurisdiction, based on the contention that plaintiff's remedy is limited to that provided by the Longshoremen's and Harbor Workers' Compensation Act, puts at issue the question of whether the State courts have jurisdiction, it is necessary that we first consider that issue, since an upholding of that exception to the jurisdiction will deprive us of the authority to consider the contention that plaintiff is not disabled, and the further contention that even if he was temporarily disabled, he has received under the Federal act more than he would be entitled to under State Workmen's Compensation Laws.

The exception again presents the now well established Twilight Zone doctrine which has followed the decision of the Supreme Court of the United States in Jensen v. Southern Pacific Co., 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, and which has been discussed in innumerable decisions of the Supreme Court of the United States and courts of this and other states, including our own decisions in Ellis v. Travelers Insurance Co., 123 So. 2d 780, and Berner v. Oil Transport Co., Inc., 126 So. 2d 731.

Although the decision in the Jensen case has been criticized as "ill starred" by Mr. Justice Frankfurter in a concurring opinion in Davis v. Department of Labor and Industries of Washington, 317 U. S. 249, 63 S. Ct. 255, and by our Brothers of the old First Circuit Court

of Appeal in Beadle v. Massachusetts Bonding & Ins. Co., 87 So. 2d 339, we have the temerity to feel and to say that we do not see that there is anything ill starred about the Jensen decision provided the doctrine announced there be limited to cases which are not purely local in nature and which actually involve the operation, maintenance, loading or unloading of vessels in navigable waters, and engaged in operations which extend beyond local ports or areas. That decision, though limited in certain respects, has never been overruled in spite of those criticisms by those and other eminent jurists.

We shall not again indulge in a protracted discussion of those numerous decisions, but shall merely state the facts which are presented in this record and which we think show that the operation in which the plaintiff here was engaged was not of a purely local nature, involved the loading and unloading of a vessel engaged in interstate and foreign commerce, and was squarely within the doctrine of the Jensen case.

According to the testimony of plaintiff himself and the fellow employees, he "always" worked in the loading and unloading of barges in which products needed by the defendant company or products produced by the defendant company were transported between this and other ports to and from the plant of the defendant company, which was located alongside its docks on the Mississippi River in this City. On all such occasions plaintiff operated either of two mechanical machines which assisted in the loading and unloading of cargo from those barges, although it is conceded that when rain prevented operation on the barges, or when there

were no barges to be loaded or unloaded, plaintiff became a part of the "labor pool" and could be assigned to jobs within the plant of the defendant company which was on shore alongside the docks, though we repeat that plaintiff and his fellow employees who testified said that his job was the loading and unloading of those barges which were engaged in interstate and foreign commerce.

On the day of the accident plaintiff was working at his regular duties on one of these floating barges. The sole question then for our determination is whether the occupation in which he at that moment was engaged was within the Twilight Zone or was so maritime in nature that to allow recovery under State Workmen's Compensation Laws would interfere with the "proper harmony and uniformity of" maritime law.

While we have stated that we shall not engage again upon a protracted discussion of the many decisions since the Jensen doctrine was announced, counsel for plaintiff, by his confident reliance upon two decisions, makes it necessary that we discuss those two decisions, both by the Supreme Court of the United States. One of them is Davis v. Department of Labor and Industries of Washington, supra; the other is Hahn v. Ross Island Sand and Gravel Co., Inc., 358 U. S. 272, 79 S. Ct. 266. Counsel says that in each of those two cases the employee was working on a barge and that, since the employee, plaintiff here, was also working on a barge, we should be controlled by those two decisions. The facts in those cases clearly distinguish them and show that in each of them the operation in which the employee was engaged

was purely local and therefore did not interfere with the proper harmony and uniformity of maritime law. The reason for this uniformity is well stated in the Jensen decision in the following words:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. * * *"

The distinction between the facts of the Davis case and the facts of the Hahn case are clearly apparent. In the Davis case the job of the employee was "to dismantle an abandoned drawbridge" which was located over a navigable river. The task of the employee was to cut steel from the bridge with oxyacetylene torches and to move it about 250 feet away for storage to await delivery "to a local purchaser." The steel when cut from the bridge was lowered to a barge and then on the barge was towed to a storage point nearby. Obviously this was a purely local operation.

In the Hahn case, as found by the Supreme Court of Oregon, the plaintiff was employed to take care of machinery on a local dredge which was used in digging up gravel which was then crushed and transferred to barges and then taken to a storage point "inside of the lagoon." Obviously there was nothing here which made

it necessary to apply the doctrine of the Jensen case. However, the Supreme Court of Oregon (320 P. 2d 668) held that the facts did not bring the matter within the so-called Twilight Zone doctrine and that recovery could be had only under the Longshoremen's and Harbor Workers' Compensation Act. The Supreme Court of the United States granted a writ of certiorari and said that, on the facts found by the Supreme Court of Oregon, "it seems plain enough that petitioner's injury occurred in the 'twilight zone,' and that recovery for it 'through workmen's compensation proceedings,' could have been, and in fact was, validly 'provided by State law' * * *."

Those two cases merely evidence the necessity in certain situations for a recognition of the Twilight Zone doctrine, but they do not require a holding that, under facts such as are involved here, the employee may proceed either under the State Compensation Law, or the Longshoremen's and Harbor Workers' Compensation Act. We are not vain enough to believe that we can state exactly where should be placed the line which should determine in every case whether or not it is a Twilight Zone case. That illusionary line has not been definitely placed by any of the eminent jurists who have discussed the question. All that we do say is that where there is involved the loading or unloading of a vessel on navigable water used in interstate or foreign commerce, or, in fact, used in any situation which is not purely local, recovery should be limited to that provided by the Longshoremen's and Harbor Workers' Compensation Act.

The Jensen case involved the loading of a vessel and there it was held that recovery could not be had

under State Workmen's Compensation Laws. Peters v. Vessey, 251 U. S. 121, 40 S. Ct. 65, 64 L. Ed. 180, involved the unloading of a vessel and the Supreme Court of the United States there reversed the Supreme Court of Louisiana and held that where the unloading of a vessel is involved, the employees may not recover under State Workmen's Compensation Laws.

Our conclusion that there can be no recovery under the State Workmen's Compensation Laws prevents our considering the alternative contentions of the defendant that the receipt by the plaintiff of compensation under the Federal law and the negotiation for and receipt by him of payment for facial disfigurement under the Federal law estops him to contend that he may now proceed under State law, and the other contention that, in any event, he has been compensated for his injuries in an amount greater than he would have received under State Compensation Laws.

The judgment overruling the exception to the jurisdiction of the State Courts is annulled and reversed and that exception is now maintained. The judgment dismissing the suit is affirmed at the cost of appellant.

AFFIRMED

SUPREME COURT OF LOUISIANA

New Orleans

BY HAMLIN, J.: May 30, 1961

Morris Narcisse, Jr.

v. No. 45,643

The American Sugar Refining Company

In Re: Morris Narcisse, Jr., applying for certiorari or writ of review to the Court of Appeal, Fourth Circuit, Parish of Orleans.

Writ refused. On the facts found by the Court of Appeal we find no error of law in its judgment.

/s/ WBH
/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ JWS
/s/ FWS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 428

MORRIS NARCISSE, JR.,

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versus

THE AMERICAN SUGAR REFINING COMPANY,

Respondent.

OPPOSITION IN BEHALF OF THE AMERICAN SUGAR REFINING COMPANY, DEFENDANT, TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

LEON SARPY,
ROBERT B. DEANE,
Attorneys for The American Sugar Refining Company, Respondent,
1500 National Bank of Commerce Building,
New Orleans 12, Louisiana.

Of Counsel:
CHAFFE, McCALL, PHILLIPS, BURKE & HOPKINS,
1500 National Bank of Commerce Building,
New Orleans 12, Louisiana.

HAUSER PRINTING CO., INC., NEW ORLEANS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 428

MORRIS NARCISSE, JR.,

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versus

THE AMERICAN SUGAR REFINING COMPANY,

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OPPOSITION IN BEHALF OF THE AMERICAN SUGAR REFINING COMPANY, DEFENDANT, TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

May It Please the Court:

The decision of the State Courts of Louisiana,[1] from which certiorari is sought, denied the applicability of the State law and upheld the exclusive applicability of the Federal Longshoremen's & Harbor Workers' Act.[2] That decision, we respectfully submit, is in perfect consonance with the decisions of this Court in the *Davis* case,[3] and with the most recent decisions of the Court of

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[1] *Narcisse v. American Sugar Refining Company*, 128 So. 2d 689 (April, 1961).

[2] 33 U.S. Code 901, *et seq.*

[3] 317 U.S. 249 (1942).

Appeal for the Fifth Circuit embracing the State of Louisiana.[1]

I.

JURISDICTION

We deny that the jurisdiction of this Court has been adequately set forth in the application (p. 2), which depends upon 28 U.S. Code 1257 (1) and (3).

Sec. 1257 (1) reads as follows:

> "By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity."

The instant case involves neither an appeal nor the validity of a treaty or statute of the United States, but an application for certiorari to a State Court seeking to apply a state statute. There is nowhere drawn in question the validity of a treaty or statute of the United States, and therefore, the decision from which certiorari is sought is not "against the validity" of any statute of the United States. Patently, then the application fails completely under 28 U.S. Code 1257 (1).

The second alleged ground of jurisdiction is 28 U.S. Code 1257 (3), which reads:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or

[1] *Flowers v. Travelers Ins. Co.*, 258 F. 2d 220 (1958), cert. den. 359 U.S. 920; *Noah v. Liberty Mutual Ins. Co.*, 267 F. 2d 218 (1959).

commission held or authority exercised under, the United States."

It is clear that no question of the validity of any treaty or statute of the United States is drawn in question. It is likewise evident that the validity of a State statute is not drawn in question on any ground. By elimination, then it leaves solely and only the last situation stated in 28 U.S. Code 1257 (3) reading as follows:

> "* * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Courts of Louisiana have decided in this case that the State law of Louisiana does not apply and that the Act of Congress in question does apply. This is simply not a case for certiorari. We are unable to find where the applicant complains that any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States has been deprived or in the least manner affected.

Hence, under the clear language of 28 U.S. Code, paragraph 1257, the application discloses no right whatever to certiorari and should therefore be denied.

II.

FACTUAL STATEMENT

The facts, as found by the State Court, are final, for there is no attack on such findings of fact. Also final is the construction placed by the State Courts on a State statute.

Applicant correctly sets forth that he was injured

on a barge afloat on the Mississippi River and that he was engaged in his employment at the time. However, applicant did not go far enough. What applicant did not state is that the State Court of Appeal found as a fact that applicant was engaged in the loading and unloading of a vessel in interstate and foreign commerce, which was applicant's principal endeavor. That Court declared:

> "We shall not again indulge in a protracted discussion of those numerous decisions, but shall merely state the facts which are presented in this record and which we think show that the operation in which the plaintiff here was engaged was not of a purely local nature, involved the loading and unloading of a vessel engaged in interstate and foreign commerce, and was squarely within the doctrine of the Jensen case.
>
> "According to the testimony of plaintiff himself and the fellow employees, he 'always' worked in the loading and unloading of barges in which products needed by the defendant company or products produced by the defendant company were transported between this and other ports to and from the plant of the defendant company, which was located alongside its docks on the Mississippi River in this City. On all such occasions plaintiff operated either of two mechanical machines which assisted in the loading and unloading of cargo from those barges, although it is conceded that when rain prevented operation on the barges, or when there were no barges to be loaded or unloaded, plaintiff became a part of the 'labor pool' and could be assigned to jobs within the plant of the defendant company which was on shore alongside the docks, though we repeat that plaintiff and his fellow employees who testified said that his job was the loading and unloading of those barges which were engaged in interstate and foreign commerce.

"On the day of the accident plaintiff was working at his regular duties on one of these floating barges. The sole question then for our determination is whether the occupation in which he at that moment was engaged was within the Twilight Zone or was so maritime in nature that to allow recovery under State Workmen's Compensation Laws would interfere with the 'proper harmony and uniformity of' maritime law.

"While we have stated that we shall not engage again upon a protracted discussion of the many decisions since the Jensen doctrine was announced, counsel for plaintiff, by his confident reliance upon two decisions, makes it necessary that we discuss those two decisions, both by the Supreme Court of the United States. One of them is *Davis v. Department of Labor and Industries of State of Washington, supra;* the other is *Hahn v. Ross Island Sand and Gravel Co., Inc.*, 358 U.S. 272, 79 S. Ct. 266, 3 L. Ed. 2d 292. Counsel says that in each of those two cases the employee was working on a barge and that, since the employee, plaintiff here, was also working on a barge, we should be controlled by those two decisions. The facts in those cases clearly distinguish them and show that in each of them the operation in which the employee was engaged was purely local and therefore did not interfere with the proper harmony and uniformity of maritime law. * * * "

The distinction between this case and the *Davis* and *Hahn* decisions was clearly drawn by the State Court, which concluded with the following statement of law:[*]

" * * * All that we do say is that where there is involved the loading or unloading of a vessel on navigable water used in interstate or foreign commerce, or, in fact, used in any situation which is not purely local, recovery should be limited to

[*] 128 So. 2d 689, 692 (1961).

that provided by the Longshoremen's and Harbor Workers' Compensation Act."

This decision is consistent with the State Court's later decision of *Ellis v. Travelers Insurance Company*, decided first by the State Court of Appeal,[6] and later by the Supreme Court of Louisiana,[7] decided in 1961, and from which no application to this Court for certiorari was filed. Moreover, the decision complained of is fully consistent with the decisions of the Fifth Circuit.[8]

III.

APPLICANT'S EMPLOYMENT WAS MARITIME AND NOT LOCAL

We have shown that the Court of Appeal found that applicant's work was maritime and not local. This is amply borne out by the record in the testimony of the claimant as well as two witnesses, and it was so found by the State Court of Appeal in the quotation from that decision above set forth, which recites that the plaintiff had "always" worked in the loading and unloading of barges in which products needed by the defendant company or products produced by the defendant company were transported in interstate and foreign commerce, and that on all such occasions plaintiff operated mechanical machines which assisted in the loading and unloading of cargo from barges engaged in interstate and foreign commerce. It was only when rain prevented the operation on the barge, or when there were no barges to be loaded or unloaded, that plaintiff was assigned to other duties on shore.

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[6] 123 So. 2d 780 (Oct. 1960).

[7] 241 La. 433 (May, 1961).

[8] See decisions cited in Note 4 *supra*.

The nature of the applicant's work was therefore the very same as that of a longshoreman employed by a stevedoring company. The fact that applicant worked directly for The American Sugar Refining Company, under substantially similar circumstances as a longshoreman employed by a stevedoring company, does not alter the fact that he was basically engaged as a longshoreman, the very same as if he had been employed by an independent stevedoring concern.

We see no violence by the State Court decision to any Federal statute or jurisprudential rule.

IV.

APPLICANT ELECTED THE FEDERAL ACT

The State Court of Appeal stated as a fact that the defendant averred that the applicant had been paid compensation by the United States Deputy Commissioner, and, further, had negotiated for and had received the amount of $200 for facial disfigurement. There is no denial by applicant that this is so. The State Court of Appeal did not pass on that point involving the election of remedies because it concluded that jurisdiction was exclusively under the Federal Act.

Hence, it clearly appears that if the State Court had jurisdiction, which we of course deny, under the law applicant made his choice and, having done so, is precluded from later going to the State Courts.

In *Wilkes v. Mississippi Sand & Gravel Co.*,[9] the employee's widow filed a claim with the U. S. Deputy Commissioner, and the Court considered the test as to

[9] 202 F. 2d 383 (6 Cir. 1953).

whether or not compensation benefits had, in fact, been accepted, and concluded:

> " * * * The test seems to be whether or not any compensation benefits have, in fact, been accepted. See *Marceau v. Great Lakes Transit Corp.*, 2 Cir., 146 F. 2d 416, and *Kibadeux v. Standard Dredging Co.*, 5 Cir., 81 F. 2d 670. That Congress anticipated the risk of employees choosing the wrong remedy is shown by their enactment of section 913(d) of title 33 U.S.C.A. See *Norton v. Warner Co.*, 321 U.S. 565, 569, 64 S. Ct. 747, 88 L. Ed. 931, and *Ayers v. Parker*, D.C., 15 F. Supp. 447, 451."

If the so-called Twilight Zone doctrine applies in this case, which we deny, the applicant has certainly made his choice irrevocable by accepting compensation through the Deputy Commissioner, plus the sum of $200 for facial disfigurement, also made through the office of the Deputy Commissioner.

For this further reason, certiorari should be denied.

V.

CONCLUSION

The decision of the State Court here is final, for it does not present a situation where certiorari lies before this Court. Furthermore, this Court has repeatedly held that certiorari will be granted only where there are special and important reasons therefor.[10] We are unable to find anything special or important in the application for

[10] *Deputy v. Dupont*, 308 U.S. 488, 500 (1939).

certiorari. We respectfully submit that the application for certiorari should be denied.

Respectfully submitted,

LEON SARPY

ROBERT B. DEANE
Attorneys for The American Sugar Refining Company, Respondent,
1500 National Bank of Commerce Building,
New Orleans 12, Louisiana.

Of Counsel:
CHAFFE, McCALL, PHILLIPS, BURKE & HOPKINS,
1500 National Bank of Commerce Building,
New Orleans 12, Louisiana.

CERTIFICATE OF COUNSEL

The undersigned counsel for respondent certifies that a copy of the above and foregoing opposition to the application for certiorari has been served on Benjamin E. Smith, attorney for the applicant, 406 Civic Center Building, New Orleans 12, Louisiana.

New Orleans, Louisiana, , 1961.

LEON SARPY